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No. 14-1516

In the Supreme Court of the United States

STEPHEN DUNCAN, WARDEN,
Petitioner,

v.

LAWRENCE OWENS,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT

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INTRODUCTION

On November 8, 2000, after a bench trial in Cook County Circuit Court that took less than a day, the court convicted Lawrence Owens of the murder of Ramon Nelson. The state and the defense agreed that the case "boils down to identification." JA110-11; *see also* JA115-17, 129-30.[1] The state called two eyewitnesses, Maurice Johnnie and William Evans, who contradicted each other and the lone testifying officer in important particulars. Announcing its ruling, the trial court criticized rather than credited the witnesses, and expressly based its guilty finding on facts with no evidentiary support in the trial record:

> After hearing this case, I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who Larry Owens knew he was a drug dealer. Larry Owens wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder.

JA133. The state's evidence *did* prove that Mr. Nelson was a drug dealer: The police recovered forty small baggies of cocaine from his coat pocket. JA107. The state's evidence did *not* prove that Mr. Owens knew Mr. Nelson was a drug dealer, or even that he knew Mr. Nelson at all. The state put on no evidence

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[1] Citations to the Joint Appendix are to JA__; to the Appendix to the Petition for a Writ of Certiorari are to App. __; and to the Record are R__.

of any connection between the two men. The state's evidence also did *not* prove that Mr. Owens "wanted to knock [Mr. Nelson] off." JA133. The state put on no evidence that Mr. Owens was involved with drugs or with gangs, or that Mr. Owens had any reason to want to "knock off" Mr. Nelson. No physical evidence linked Mr. Owens to the attack. App. 119a-120a.

At the outset, it is important to clarify what this case is about and, equally important, what this case is not about. Mr. Owens was not tried to a jury, and this case is not about jury trials or jury verdicts. Nor does this case present for consideration any issue concerning any general requirements for how courts must decide criminal bench trials or what they must say, if anything, in announcing their verdicts. This appeal presents only the unusual circumstance in which the trial court stated on the record that it was finding the defendant guilty based upon key facts that had no support in the trial record.

This Court has held time and again, in a variety of circumstances, that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial and not on ... circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978); *accord*, *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986); *Estelle v. Williams*, 425 U.S. 501, 503 (1976). "In the constitutional sense, trial ... in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's

right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965).

Petitioner does not dispute the existence or fundamental nature of the right to have one's "guilt or innocence determined solely on the basis of the evidence introduced at trial." *Taylor*, 436 U.S. at 485. But Petitioner urges this Court to overlook the trial court's blatant violation of that fundamental due process right because Petitioner claims that this Court has not seen another case in which a trial court has violated this Court's clearly established due process rights in exactly this fashion. That is not what 28 U.S.C. § 2254(d) requires.

Petitioner's brief opens with the suggestion that the trial court's ruling may not even have been error. *See*, Pet. Br. i ("if error"). The state appellate court held the ruling was error, although a two-to-one majority mistakenly adjudged that error harmless. In its order of December 4, 2002, the appellate court held:

> The State attempts to justify the trial court's comments by arguing that the comments were based upon the evidence.... However, there was no evidence presented that defendant knew Nelson was dealing drugs, and there was no evidence presented that defendant was involved with gangs or the illegal drug trade.

App. 118a-119a. The state appellate court admonished the trial court, "in a case such as this, where there is no physical evidence linking

defendant to the crime and the identity of the perpetrator of the charged crime is at issue and defendant's conviction rests upon eyewitness identification testimony – every effort should be made to assess the credibility of the eyewitnesses, resolve any conflicts in their testimony, weigh the evidence and draw reasonable inferences therefrom." App. 120a.

Nevertheless, the appellate court did not remand to the trial court to make those assessments in Mr. Owens's case. Rather, it dismissed the trial court's error as harmless, despite substantial problems with the eyewitness testimony at trial, testimony that, as the dissent noted, the trial court "never stated that he relied on...." App. 128a.

As the dissent's observation highlights, this is a unique case meriting the grant of habeas relief: "What we do have is a trial court manufacturing, supplying, and interjecting its own evidence into a trial and then affirmatively stating on the record that this manufactured evidence constituted the basis of its verdict. I fail to comprehend how such conduct can be regarded as 'harmless error.'" App. 128a-129a. Under *Brecht v. Abrahamson*, 507 U.S. 619 (1993) and *Davis v. Ayala*, 135 S. Ct. 2187 (2015), this judicially–manufactured evidence had a substantial and injurious effect on the trial court's finding of guilt, causing Mr. Owens actual prejudice, and the state appellate court's affirmance was unreasonable. Issuance of the writ should be affirmed.

STATEMENT OF THE CASE

1. Trial

On September 22, 1999, Ramon Nelson was attacked with a wooden stick or baseball bat outside of Mackie's Lounge and liquor store in Markham, Illinois. App. 98a. Mr. Nelson subsequently died from his injuries. App. 98a. Mr. Owens was indicted for the murder of Mr. Nelson and tried before Judge Macellaio in Cook County Circuit Court on November 8, 2000. JA5. The entire bench trial took less than a day. JA6-133. There was no physical evidence linking Mr. Owens to the crime scene. App. 120a. The state's case depended on the testimony of two eyewitnesses. App. 119a.

a. Maurice Johnnie

The state's questioning of its first eyewitness, Mr. Johnnie, concerning the night of September 22, 1999 began with Mr. Johnnie sitting with his friend Johnnie Morgan ("Mr. Morgan") in Mr. Johnnie's car in the parking lot at Mackie's, a liquor store and lounge in Markham, Illinois, a southern suburb of Chicago. JA16. Although the car was Mr. Johnnie's, Mr. Morgan was driving. JA16-17 Mr. Morgan also witnessed the events at issue but did not testify at trial. JA16, 20, 26-27 Asked why Mr. Morgan was driving, Mr. Johnnie testified that Mr. Morgan "was a friend of mine, and he washes and clean my car, I let him drive it." JA17 They were with a third person in Mr. Johnnie's car, whom Mr. Johnnie said was a friend of Mr. Morgan's that Mr. Johnnie did

not know. JA17 This person left the car before the attack began. JA19.

A "crowd" of "[a]bout four or five" people were congregated to Mr. Johnnie's left in front of Mackie's. JA40. Mr. Johnnie testified that from that crowd, the victim, Mr. Nelson, rode over on a bicycle to Mr. Johnnie's car and spoke with Mr. Morgan for what Mr. Johnnie estimated to be three to five minutes. JA20, 39-40. Mr. Johnnie testified that he did not know Mr. Nelson, JA20, but that Mr. Nelson "seemed to be an admirer of him, of [Mr.] Morgan." JA39. After Mr. Nelson's conversation with Mr. Morgan ended, Mr. Johnnie testified, Mr. Nelson bicycled up to the front of Mr. Johnnie's car, turned right, and encountered a solitary person, about 10 to 12 feet or more away to the north of Mr. Johnnie's car. JA40-42.

As this person approached Mr. Nelson, Mr. Johnnie "did not see anything in his hands." JA23. Mr. Johnnie reported that Mr. Nelson began to turn his bicycle around; at that time the assailant suddenly hit Mr. Nelson with a wooden stick or baseball bat, twice while Mr. Nelson was up on the bicycle and once more after he had fallen, into the doorway of Mackie's liquor store about ten feet from Mr. Johnnie's car. JA23-25. Apparently the assailant's back was turned towards Mr. Johnnie during at least part of the attack; Mr. Johnnie testified that he got his best chance to look at the assailant "[a]s he turned away from the kid and was walking away " JA52.

After the attack, Mr. Johnnie and Mr. Morgan got out of the car and went to see Mr. Nelson. JA26. According to Mr. Johnnie, "other people came around, and they suggested that we take him to the hospital," which Mr. Morgan and Mr. Johnnie did. JA27 Mr. Johnnie stayed outside the hospital door and avoided talking to the hospital personnel; only Mr. Morgan spoke with them. JA48-49. As soon as Mr. Morgan brought the victim into the hospital, Mr. Johnnie and Mr. Morgan got back into the car to leave. JA48-49.

When initially asked on cross-examination whether he had spoken to police at the hospital, Mr. Johnnie responded: "There was no police at the hospital." JA36-37 Later in the examination, however, Mr. Johnnie conceded that the police arrived at the hospital while he was still there: "The police had pulled up the same time" he and Mr. Morgan were in his car about to leave the hospital. JA49. They stayed in the car, and Mr. Johnnie did not speak to the police there. JA50-51. Mr. Johnnie testified that Mr. Morgan shouted to the police from the car that they had brought the victim to the hospital and then they drove back to Mackie's. JA48-51.

Mr. Johnnie testified that the decision to return to Mackie's was Mr. Morgan's, JA46, and that Mr. Johnnie had "[n]ot really" wanted to go back there, JA48. Initially Mr. Johnnie testified "I don't know why he went back to Mackie's." JA46. Mr. Johnnie later speculated: "Well, actually the third person in the car we had left him at Mackie's, and I can't

remember. He was not there when we came back to Mackie's." JA47.

When Mr. Morgan and Mr. Johnnie got back to Mackie's, "there was an officer there." JA36. Again, Mr. Johnnie avoided talking to the police:

Q. Did you talk to that officer?

A. [Mr. Morgan] spoke to the officer.

Q. Thank you. Sir, I need to ask you, please. Did you talk to the officer?

A. No, I did not talk to the officer.

JA36; *see also* JA54 (claiming that "we told the police that we saw what happened" but then admitting that "Johnnie [Morgan] told the police that" and "I did not.").

Mr. Johnnie never contacted the police; instead, the police came to his house six days later, on September 28, 1999, and only then did he go to the police station. JA53-55. Mr. Johnnie testified that at the police station, he gave Detective Sergeant Terry White of the Markham Police Department a very general description of the attacker as "approximately two hundred forty pounds and around 6'2." JA44-45. Mr. Johnnie also testified that after he gave this description, Sergeant White "showed me a book" of photographs. JA44. Sergeant White stated that he showed Mr. Johnnie a photo-array of only six photographs, and that Mr. Johnnie selected a photograph of Mr. Owens from that array. JA57-59.

Approximately five weeks after the attack, Sergeant White had Mr. Johnnie view a lineup of five people, and Mr. Johnnie identified Mr. Owens as the assailant. JA33-35, 65-66. Mr. Johnnie testified that only one person who was in the photo-array was also in the lineup, *i.e.*, Mr. Owens. JA45. Sergeant White, who also conducted the lineup, confirmed that Mr. Owens was the only individual who appeared in both the photo-array and the lineup. JA71.

b. William Evans

The only other eyewitness to testify at Mr. Owens's trial was William Evans. JA74. Before providing his recollection of the events of September 22, 1999, Mr. Evans informed the trial court that he was currently incarcerated for a pending charge of possession of a controlled substance with intent to deliver, which had occurred while he was on probation from a previous conviction for delivery of a controlled substance. JA75. As Mr. Evans explained, in return for his testimony in Mr. Owens's case, the state had agreed to recommend a sentence of probation in his new drug case, and that he be re-committed to probation for his previous conviction despite his probation violation. JA76.[2]

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[2] In addition, stipulations were entered concerning Mr. Evans's meeting with Assistant State's Attorneys regarding the testimony he would provide during Mr. Owens's trial, JA108, as well as a transcript of Mr. Evans's grand jury testimony, JA109, and the cooperation deal Mr. Evans reached with the state, JA108-109.

Mr. Evans testified that on the night of September 22, 1999, he had been on the corner of the block where Mackie's was located and had spent between thirty minutes to an hour talking to someone he referred to as "Kermit," previously identified as the victim, Mr. Nelson. JA11, 76-78. Although Mr. Evans did not specify exactly the time at which the events at issue occurred, he noted "[i]t was just a little bit after dark, but it was not really dark yet." JA80. After their discussion concluded, Mr. Evans testified, he saw Mr. Nelson bike in front of Mackie's and begin talking with two individuals Mr. Evans had seen before but did not know by name. JA79-80. At trial, Mr. Evans said that, just before they began talking with Mr. Nelson, he had seen the two individuals arrive together at Mackie's, walking from the north. JA79. Mr. Evans was impeached by defense counsel on his trial testimony about where these two individuals came from before encountering Mr. Nelson with his grand jury testimony, however. There, Mr. Evans had testified that these two people "were leaving from Mackie's" when they stopped to talk to Mr. Nelson. JA102.

One of these two individuals Mr. Evans identified at trial as Mr. Owens. JA79-81. Mr. Evans claimed that individual had a baseball bat in his hand, and that at the moment Mr. Evans looked away, bending down to retrieve a bucket of water (with which, he said, he was going to wash a car) he heard "a sound like some wood was being split or broken." JA81-82. Looking up, Mr. Evans testified he saw Mr. Nelson being hit with the bat, and shortly thereafter, two

assailants fled the scene, running past Mr. Evans as they made their escape. JA82-85. Mr. Evans did not claim to have seen the assailants' faces as they ran past him; he was focused on Mr. Nelson at the time. JA85.

Mr. Evans testified he had briefly spoken to the police the night of the incident and told them one of the two assailants was taller than he was and the other was about his height (5'9"); he said the police did not ask for, and he did not provide, any further description that night. JA94-96.

Mr. Evans viewed the same photo-array on the same day as Mr. Johnnie with Sergeant White at the Markham Police Station. JA68, 85-86. During trial on November 8, 2000, the state showed Mr. Evans that photo-array. JA86. Despite the presence of Mr. Owens in the courtroom wearing a "DOC uniform," JA83, and Mr. Evans's claim that he recognized the assailants "[f]rom previous times being around by the store," JA80, when asked in court to pick out the photograph of the assailant he had selected at the police station, Mr. Evans twice identified the photograph of a person other than Mr. Owens. *Compare* JA86 (Mr. Evans selecting the "second" photograph as the assailant) *with* JA63, 68-69 (Sergeant White testifying that photograph "four" was Mr. Owens).

In late October 1999, approximately five weeks after the incident, Mr. Evans identified Mr. Owens in the same lineup that Mr. Johnnie viewed. *See* JA66-68. Thus, Mr. Owens was the only person in both the

photo-array and lineup that Mr. Evans viewed. JA71.

During his direct examination, Mr. Evans testified that he had not seen either Mr. Johnnie's car or the people in it at the scene before he helped put the victim into the car to go to the hospital. JA88. Mr. Evans reiterated that assertion on cross-examination:

> "Q. You never saw this car parked directly in front of Mackie's two entranceways, is that correct?
>
> A. I didn't see the car until we were putting [Mr. Nelson] into the car."

JA94. On redirect, the state impeached Mr. Evans with his grand jury testimony to the contrary. JA103.

c. Other Trial Evidence And Argument

In addition to Mr. Johnnie and Mr. Evans, the only other witnesses who testified during trial were Barbara Nelson, the victim's mother, who identified her son, but did not testify that she knew Mr. Owens or that she was aware of any connection between her son and Mr. Owens, JA9-14, and Sergeant White, who testified regarding the eyewitnesses' identifications of Mr. Owens, JA57-72. The parties stipulated to the admission of testimony from the hearing on the motion to quash the warrantless arrest of Mr. Owens given by Officer Michael Alexander, who arrested Mr. Owens about a month after the incident, on October 26, 1999. JA56; App.

98a. Officer Alexander did not arrest Mr. Owens for the murder of Mr. Nelson. Instead, Officer Alexander arrested Mr. Owens after spotting him speeding; he gave chase when Mr. Owens did not pull over. App. 100a. The parties also stipulated to the cause of Mr. Nelson's death. JA105-06. The only other substantive evidence presented during trial was the stipulation that Officer Lee Dean, if called as a witness, would have testified that at the hospital "he recovered a clear plastic bag from the coat worn by Ramon Nelson." JA107. In the bag, Officer Dean would have testified, he found "forty smaller plastic bags, each of which contained an off white rocky substance[,] ... which tested positive for the presence of cocaine." JA107.

The state presented no physical evidence linking Mr. Owens to the attack and no confession. No witness testified, and the state presented no evidence, that Mr. Owens knew that Mr. Nelson was a drug dealer, or that Mr. Owens even knew Mr. Nelson at all. No witness testified to any connection at all between Mr. Owens and Mr. Nelson. No evidence was introduced that Mr. Owens had any involvement at all in the drug trade, or that Mr. Owens had any reason for wanting to kill Mr. Nelson, either because of Mr. Nelson's drug dealing or for any other reason. App. 119a-120a.

At the close of the evidence, the trial court denied defense counsel's motion for a directed verdict. JA110. The defense immediately rested. JA110.

During closing argument, the state summed up its case succinctly: "Judge, it boils down to

identification. I think it is very clear that is the issue at this point." JA110. The state then discussed the evidence upon which it was relying in seeking Mr. Owens's conviction. As regards Mr. Johnnie's testimony, the prosecutor noted, "[h]e sat there. He saw the baseball bat. He saw the defendant's face. He saw the defendant clubbing Ramon Nelson with the baseball bat. ... [Mr. Owens] is the individual who did it, and he was identified again by Mr. Johnnie." JA111. Recounting Mr. Evans's testimony, the prosecutor again emphasized that Mr. Evans had testified: "[T]he defendant is the one with the bat. The defendant is the one that is hitting Ramon Nelson. The defendant is the one that flees. The defendant is the one [Mr. Evans] picks out of the photo-array himself." JA115. In finishing his closing, the prosecutor once more stated: "I can't reiterate enough about the identification, how they identified him and where, and what they did." JA115.

In rebuttal, the prosecutor again commented, "Judge, this is a case about identification, and in this case identification equals recognition." JA130.

The trial court then pronounced its verdict:

> After hearing this case, I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who Larry Owens knew he was a drug dealer. Larry Owens wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder.

JA133. On December 4, 2000, Mr. Owens timely moved for a new trial, raising various objections to the evidence introduced against him and the strength of the state's case. R1541-43. Of relevance here, Mr. Owens claimed "[t]he court erred in infusing its theory of the case without any evidence before it to allow the reasonable inference for such theory." R1542. The trial court denied Mr. Owens's motion for a new trial. App. 110a.

2. State Court Direct Appeal

Mr. Owens timely appealed his conviction. R1686. Among other issues, he argued that the "trial court's baseless, extrajudicial findings denied defendant a fair trial." R1638 (capitalizations omitted). Specifically, Mr. Owens argued that "the trial court expressly found that defendant knew that the victim was dealing drugs and wanted to 'knock him off,' despite the State's failure to offer evidence as to defendant's knowledge of the victim, let alone any motive or any involvement in a drug or gang scheme." *Id.*

The state appellate court agreed, in an unpublished order, that the trial court had committed an error in finding facts not supported by record evidence. App. 97a-129a. The court observed "there is no indication whether or not the trial court assessed the credibility of the eyewitnesses, resolved conflicts in their testimony, or weighed the evidence or drew reasonable inferences therefrom." App. 118a. Moreover, the appellate court noted "there is no physical evidence linking defendant to the crime and the identity of the perpetrator of the charged

crime is at issue and defendant's conviction rests upon eyewitness identification testimony...." App. 120a. The appellate court further acknowledged that "[i]t is true that Johnnie and Evans contradict each other on some points regarding the event," – noting specifically that Mr. Evans claimed there were two assailants while Mr. Johnnie testified there was only one – "and the reliability of Evans' testimony is severely called into question." App. 119a, 119a n.2.

Nevertheless, a two-to-one majority upheld the verdict, opining that "Johnnie's identification testimony is reliable and sufficient enough to support the trial court's guilty verdict," App. 119a-120a, even though the trial court never credited that identification. The appellate court held "the trial court's speculation as to defendant's motive for assaulting Nelson, will be construed as harmless error." App. 120a.

Justice South dissented, and would have overturned the verdict. App. 127a-129a. Justice South focused on the trial court's stated basis for convicting Mr. Owens, noting "the record affirmatively demonstrates that the court reached its verdict solely based upon defendant's purported motive." App. 128a. Thus "[w]hat we do have is a trial court manufacturing, supplying, and interjecting its own evidence into a trial and then affirmatively stating on the record that this manufactured evidence constituted the basis of its verdict." App. 128a-129a. Justice South deemed the eyewitness identifications "marginal at best" given that Mr. Evans's testimony was "doubtful and highly

suspect" – all the more so in light of Mr. Evans's cooperation agreement and selection of the photo of someone other than Mr. Owens at trial – and that the trial court "never stated that [it] relied on [Mr. Johnnie's] identification or other properly admitted evidence." App. 127a-129a. Justice South concluded: "I fail to comprehend how such conduct can be regarded as 'harmless error.'" App. 129a. Justice South would have held that "justice and fundamental fairness demand that defendant be afforded a new trial free from such prejudice." App. 129a. Mr. Owens raised the trial court's extrajudicial finding in his petition for leave to appeal to the Illinois Supreme Court, *see* R1776-77, 1791-92, but the Illinois Supreme Court denied the petition, *see* App. 96a.

3. State Post-Conviction Proceedings

Mr. Owens filed a *pro se* petition for state post-conviction relief on September 10, 2003; five years passed without a ruling before an attorney filed a supplemental petition.[3] R507 In these petitions, Mr. Owens argued that his trial attorney had been constitutionally ineffective and that he was actually innocent. *See* R507-08.

In December 2008, with his state post-conviction petition still pending in those proceedings, Mr. Owens filed a *pro se* petition for habeas relief in federal district court under 28 U.S.C. § 2254. R1.

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[3] As the district court noted, no copy of petitioner's *pro se* petition from 2003 appears in the record, but it is uncontested that Mr. Owens filed it.

Thereafter, in an oral ruling on September 29, 2009, the state trial court finally denied Mr. Owens's state post-conviction petition. R339. Mr. Owens appealed. In federal court, the state moved to dismiss Mr. Owens's federal petition for failure to exhaust his state court remedies. R65-75. On March 9, 2010, the district court denied that motion, observing that "despite [Mr. Owens's] diligence 'in making contact with his lawyers, seeking information from them, and urging action,' the state trial court had taken more than six years to rule on the petition, and no further ruling was in sight." R508 (quoting Mar. 9, 2010 Minute Order).

On March 21, 2011, the Illinois Appellate Court summarily affirmed the denial of Mr. Owens's state post-conviction petition. *See* App. 92a-95a. The appellate court denied Mr. Owens's petition for rehearing on June 22, 2011, and the Illinois Supreme Court denied his petition for leave to appeal on September 28, 2011. R426; App. 91a.

4. Habeas Corpus Proceedings In The District Court

With Mr. Owens's lengthy state post-conviction process finally resolved, the district court adjudicated his federal habeas petition. In his December 2008 *pro se* habeas petition, Mr. Owens raised five claims for relief.[4]

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[4] As the district court recounted them, Mr. Owens claimed that:

> (1) the long delay in resolution of his state court postconviction petition violated his due process rights; (2) there was no probable cause to arrest him; (3) the trial court should have suppressed the photo-array

Mr. Owens's fourth claim asserted that his "5th and 14th amendment[] right[s]" were violated "due to the fact[] that the trial court's findings of (guilt) [were based on] extrajudicial findings regarding alleged motive to commit the crime charged denied the petitioner a fair and impartial trial ... especially where the trial court, in fact, based its finding of guilt, on evidence that was not produced at, or during the court proceedings and trial." R7.

The district court rejected Mr. Owens's extrajudicial findings claim on the merits. R513-14. In recounting the facts of the case, the district court observed "[i]t is unclear from the record what evidence the court considered in support of this finding. Certainly, there was evidence that [the victim] dealt drugs.... There is also evidence that at least one of the prosecution's two witnesses was involved in the illegal drug trade. No other record evidence suggests that Owens knew [the victim] was a drug dealer, however, or that Owens himself was involved in drug trade." R503. Nevertheless, the district court determined "it is not unreasonable for the appellate court to determine the error of motive

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and lineup evidence because it was improperly suggestive; (4) the trial court made improper 'extrajudicial' findings regarding Owens's motive, basing its finding of guilt on evidence not produced at trial; and (5) trial counsel provided ineffective assistance of counsel.

R510. The district court resolved the first three claims against Mr. Owens on motions and the fifth after an evidentiary hearing. R510-12, R522-23.

speculation as harmless beyond a reasonable doubt." R514.

The district court declined to issue a certificate of appealability on any of Mr. Owens's claims. R1959. On April 23, 2014, Mr. Owens timely filed a *pro se* "request for certificate of appealability" raising, *inter alia*, his challenge to the trial court's extrajudicial findings. 7th Cir. Dkt. 10 at 9-12. On May 12, 2014, the Seventh Circuit granted a certificate of appealability, finding Mr. Owens had "made a substantial showing of the denial of his right to due process by the trial court's reliance on extra-record facts when deciding Owens' guilt." 7th Cir. Dkt. 11. The Seventh Circuit then appointed *pro bono* counsel to represent Mr. Owens on appeal. 7th Cir. Dkt. 12.

5. Appeal To The Seventh Circuit

A unanimous panel of the court of appeals reversed, granted the writ of habeas corpus, and gave the state 120 days in which to decide whether to retry Mr. Owens. App. 1a-10a. The court noted: "No evidence was presented that Owens had known Nelson, used or sold illegal drugs, or had any gang affiliation. If Owens had had any record of involvement in the illegal drug trade, or in gangs, the prosecution would, one imagines, have presented evidence of that involvement; it did not." App. 3a. The court further observed: "Also absent was any physical evidence (such as fingerprints on the baseball bat) pointing to Owens as the murderer." App. 3a. Quoting the trial court's expressed reason for convicting, the court of appeals noted the trial court's dissatisfaction with the state's witnesses ("'all

of the witnesses skirted the real issue,'" App. 4a) and that "he thought that Owens' knowledge that Nelson was a drug dealer was *the* fact that dispelled reasonable doubt of Owens' guilt." App. 5a (court's emphasis). The court then correctly recited and applied the *Brecht* standard for harmless error and concluded that "Owens has satisfied this standard. ... The trial court's singling out as the only explanation for the verdict a 'fact' having no evidentiary support, and declaring it the 'real issue' in resolving the case, had to have had such a[] [substantial and injurious] influence." App. 9a.

Finally, the court addressed Section 2254(d)'s "clearly established" standard and held "there's no question that the right to have one's guilt or innocence adjudicated on the basis of evidence introduced at trial satisfies that exacting standard." App. 9a-10a. In support, the court cited "the Supreme Court decisions in *Holbrook*, *Taylor*, and *Estelle*, and our own *Garcia* and *Moore* decisions," App. 10a; *see also* App. 2a.

SUMMARY OF ARGUMENT

The Antiterrorism and Effective Death Penalty Act (AEDPA) authorizes federal courts to grant habeas corpus relief where the adjudication of a state criminal proceeding has resulted in a decision contrary to, or involving an unreasonable application of, clearly established federal law as determined by this Court. As the court of appeals correctly concluded, Mr. Owens's conviction violated federal law clearly established by several decisions of this Court, specifically, the due process right to be

convicted solely on the basis of evidence introduced at trial. At Mr. Owens's trial, the identity of the assailant was the sole disputed issue. The state produced no physical evidence linking Mr. Owens to the crime, but relied instead on two dubious and contradictory eyewitnesses to identify Mr. Owens as the assailant. In announcing the verdict, the trial court stated that "all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who Larry Owens knew was a drug dealer. Larry Owens wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder." As the state appellate court concluded unanimously, "there was no evidence presented that defendant knew Nelson was dealing drugs, and there was no evidence presented that defendant was involved with gangs or the illegal drug trade."

Petitioner does not dispute the fundamental due process right to be convicted solely based on evidence at trial, but contends that the court of appeals erred by framing the issue at too high a level of generality and because motive is not an element of murder under Illinois law. Neither of these points has merit. Clearly established precedent from this Court demonstrates that the due process right at issue is sufficiently specific that habeas relief may be granted where a trial court bases a finding of guilt on facts not in evidence. Further, decisions in this Court and the Illinois Supreme Court establish that motive is a key means of establishing whether a

particular person committed a crime where identity is at issue.

In a two-to-one decision, however, the state appellate court held the trial court's error harmless in a ruling contrary to clearly established federal law. The state appellate court merely set aside the trial court's error and assessed the remaining evidence without determining, as this Court's precedents require, whether the trial court would have convicted if it could not consider Mr. Owens's supposed knowledge of, and motive to kill, the victim. Further, the state appellate court conducted its harmless error analysis unreasonably by substituting its view of the credibility of the eyewitnesses for that of the trial court. Properly viewed under this Court's clearly established harmless error precedent, the trial court's error had a substantial and injurious effect and influence on the guilty verdict, causing Mr. Owens actual prejudice. For these reasons, the grant of the writ should be affirmed.

ARGUMENT

I. Clearly Established Supreme Court Precedent Prohibits A Criminal Conviction Based On Facts Not Presented At Trial.

The AEDPA empowers federal courts to grant habeas relief in cases where a state court's adjudication has "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.

§ 2254(d)(1); *see Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007); *Rompilla v. Beard*, 545 U.S. 374, 380 (2005). "Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court." *Williams v. Taylor*, 529 U.S. 362, 404 (2000); *see, e.g., Brewer v. Quarterman*, 550 U.S. 286, 289 (2007). First, Section 2254(d)(1) authorizes habeas relief where state court decisions are "contrary to" the Court's clearly established precedent when they "appl[y] a rule that contradicts the governing law set forth in [the Court's] cases," or "confront[] a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrive[] at a result different from [the Court's] precedent." *Williams v. Taylor*, 529 U.S. at 405-06.

Second, Section 2254(d)(1) also authorizes habeas relief from state court decisions that are an "unreasonable application of" the Court's clearly established precedent because they "correctly identif[y] the governing legal rule but appl[y] it unreasonably to the facts of a particular prisoner's case...." *Williams v. Taylor*, 529 U.S. at 407-08; *Porter v. McCollum*, 558 U.S. 30, 44 (2009) (per curiam).

This Court has held "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. Nor does AEDPA prohibit a federal court from finding an application of a principle

unreasonable when it involves a set of facts different from those of the case in which the principle was announced. The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (citations and quotations omitted). "These principles guide a reviewing court that is faced ... with a record that cannot, under any reasonable interpretation of the controlling legal standard, support a certain legal ruling." *Id.*; *see Lafler v. Cooper*, 132 S. Ct. 1376, 1390 (2012).

A. The Court Of Appeals Correctly Identified Precedent From This Court That Clearly Established The Due Process Right Violated At Mr. Owens's Trial.

Petitioner's primary argument is that there is no "clearly established Federal law" governing Mr. Owens's claim. Pet. Br. 14-20. That argument is incorrect. This Court has established that criminal defendants have a fundamental due process right not to be convicted based on supposed facts for which there is no evidence in the record, whether in a jury trial or in a bench trial. The Seventh Circuit correctly identified *Holbrook*, 475 U.S. at 567; *Taylor*, 436 U.S. at 485; and *Estelle*, 425 U.S. at 503 as among this Court's cases recognizing that right. App. 2a, 10a.[5]

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[5] That the Seventh Circuit, after citing Supreme Court precedent, then referred to two of its own cases is irrelevant. *See* Pet. Br. 20-21. The Seventh Circuit correctly determined that *this Court's* precedent established that criminal

There is no debate that "[t]he right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." *Estelle*, 425 U.S. at 503; U.S. Const. amend. XIV, § 1. Due process requires that a "verdict must be based upon the evidence developed at the trial." *Turner*, 379 U.S. at 472 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)). "This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416." *Id.* (quoting *Irvin*, 366 U.S. at 722 (1961)); *see also Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences."). Petitioner does not contest that this is a bedrock principle of the criminal justice system. Nor could he, given this Court's precedents.

In *Estelle*, this Court identified the presumption of innocence as a "basic component of a fair trial" and stated that to implement this presumption, "courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence

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defendants have the right for their guilt or innocence to be adjudicated on the basis of evidence introduced at trial; the cites to its own cases were only further support for this point. *See* App. 2a. Moreover, the Seventh Circuit did *not* "canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to this Court, be accepted as correct." *See Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013) (per curiam) (citing cases).

and beyond a reasonable doubt." 425 U.S. at 503. The Court held the Fourteenth Amendment prohibited the state from compelling a criminal defendant to wear identifiable prison clothing at a jury trial "because of the possible impairment of the presumption so basic to the adversary system." *Id.* at 504.

Although *Estelle* ultimately concluded that defendant's failure to object may have been tactical and the defendant therefore waived his claim, *id.* at 512-13, two years later the Court held that *Estelle* "quite clearly relates the concept of presumption of innocence to the cognate requirements *of finding guilt only on the basis of the evidence* and beyond a reasonable doubt." *Taylor*, 436 U.S. at 486 n.13 (emphasis added).

In *Taylor*, this Court held that the state trial court violated the Fourteenth Amendment by refusing to give a requested jury instruction on the presumption of innocence. *Id.* at 490. Citing *Estelle*, the Court stated unequivocally that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, *or other circumstances not adduced as proof at trial.*" *Taylor*, 436 U.S. at 485 (emphasis added). The Court specifically criticized the prosecution for "asking the jury to make inferences about petitioner's conduct from 'facts' not in evidence, but propounded by the prosecutor." *Id.* at 486. The Court thus reversed the state conviction in *Taylor* because the state trial

court had not instructed the jury adequately to counter the risk that jurors might violate "the accused's constitutional right to be judged solely on the basis of proof adduced at trial." *Id.*

Thirteen years before *Taylor*, in *Turner*, this Court reviewed a state conviction where the two deputy sheriffs who were placed in charge of the sequestered jury were prosecution witnesses at the trial. 379 U.S. at 468-69. Concerned about what the deputies might have said to the jurors outside the courtroom, this Court held that the constitution requires "at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." 379 U.S. at 472-73. Thus, the Court held that "the potentialities of what went on outside the courtroom during the three days of the trial may well have made these courtroom proceedings little more than a hollow formality." *Id.* at 473. Even though the deputies testified that they had not discussed the case with jurors, the Court deemed the risk that evidence developed against the defendant might not "come from the witness stand in a public courtroom" violated the constitution and required reversal of the state conviction. *Id.*

Petitioner's attempts to distinguish this Court's precedents fail. Pet. Br. 17-21. Petitioner cannot dispute that *Taylor* clearly establishes (or re-establishes) "the accused's constitutional right to be judged solely on the basis of proof adduced at trial."

436 U.S. at 486. As evidenced by its own words, the trial court in Mr. Owens's bench trial 22 years after *Taylor* relied expressly on facts not based on any evidence at trial. JA133; *see* App. 128a-129a. This reliance plainly violated Mr. Owens's clearly established due process right "to be judged solely on the basis of proof adduced at trial." *Taylor*, 436 U.S. at 486.[6]

Petitioner does not address this Court's holding in *Turner*. In violation of the holding in *Turner*, the fact-findings upon which the trial court expressly based Mr. Owens's guilty verdict did not "come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." 379 U.S. at 473. Because the state never provided any evidence of the supposed facts that led the trial court to convict, Mr. Owens never had a chance to confront or cross-examine on those facts. Mr. Owens had no chance to put on his own evidence to contradict the trial court's unsupported speculations. Mr. Owens's counsel could not address "the real issue" that led the trial court to convict him. *Cf. Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.").

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[6] In 1986, *Holbrook* expressly reaffirmed the due process right clearly established in *Estelle* and *Taylor*, 475 U.S. at 567-68, though it found that the presence of security guards in the courtroom there did not violate that right, *id.* at 572.

Petitioner seizes on the fact that Mr. Owens was tried by a judge rather than a jury. Pet. Br. 17 While Petitioner does not contend that this due process right applies only at jury trials, Petitioner invokes the presumption that judges "know and follow the law and [are] less susceptible to considering improperly admitted evidence than are juries." Pet. Br. 17 (citing *Williams v. Illinois*, 132 S. Ct. 2221, 2235 (2012) and *Harris v. Rivera*, 454 U.S. 339, 346 (1981) (per curiam)). That may be true as a general proposition, but this is not a case about the impact of improperly admitted evidence on a trial court. This case involves a trial court making up facts out of whole cloth, as the state appellate court acknowledged. App. 119a. No presumption can immunize this due process violation.[7]

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[7] The actual holdings in Petitioner's cases, *Williams* and *Harris*, are irrelevant here. *Williams* holds that *Crawford v. Washington*, 541 U.S. 36, 50 (2004) does not "preclude[] an expert witness from testifying in a manner that has long been allowed under the law of evidence," *i.e.*, "from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify," *see Williams*, 132 S. Ct. at 2227. *Williams* also holds that *Crawford* does not "substantially impede[] the ability of prosecutors to introduce DNA evidence," *id.* The State had no expert witness at Mr. Owens's trial and no physical evidence at all, let alone DNA evidence.

Harris "h[e]ld that there is no federal requirement that a state trial judge explain his reasons for *acquitting* a defendant in a state criminal trial; even if the acquittal rests on an improper ground, that error would not create a constitutional defect in a guilty verdict [for co-defendants of the acquitted defendant] that is supported by sufficient evidence and is the product of a

Petitioner relies on the state appellate court's invocation of this presumption to justify ignoring the trial court's express explanation of its primary reason for finding Mr. Owens guilty. Pet. Br. 22 (citing App. 118a and *People v. Worlds*, 400 N.E.2d 85, 87-88 (Ill. App. Ct. 1980)). Ironically, the *Worlds* decision, on which the state appellate court and Petitioner rely, *rejects* the application of this presumption and *reverses* a conviction where – as here – the record clearly establishes through the trial court's own statements that the court relied in part on improper evidence (or non-evidence, as here): "It would verge upon the ridiculous for us to say that the trial court paid no attention to information which he himself expressly elicited. We regard this type of situation as comparable to one in which the trial court engages in a private investigation." *Id.* (citations omitted). At least as troubling to the fact-finding function as the trial court that engages in a private investigation is the trial court that simply makes up facts on which to base its guilty verdict.[8]

Petitioner's reliance on this Court's decision in *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) as a federal basis for applying this

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fair trial." 454 U.S. at 344 (emphasis added). Here, however, it is a *guilty verdict*, not an acquittal, that rests upon an improper ground, *i.e.*, facts unsupported by any evidence at trial.

[8] The dissent in Mr. Owens's case takes the majority to task for applying this presumption in this case: "In the instant case that presumption has been clearly and undeniably rebutted. Even the majority cannot deny that the trial court considered matters outside the trial record." App. 128a.

presumption here also is misplaced. Pet. Br. 22-23. Nothing in *Visciotti* suggests that "the presumption that state courts know and follow the law," 537 U.S. at 24, is irrefutable even in the face of express statements by a trial court on the record demonstrating the opposite. No presumption anywhere in federal or Illinois law protects a trial court's findings based on no evidence at all.

Nor does Petitioner's attempt to distinguish this Court's precedents based on the state's role in the trial court's error withstand analysis. Pet. Br. 17. The fact that "the State in this case did not invite the trial court to infer [Mr. Owens's] guilt from any improper basis, as the prosecution did in *Taylor*," Pet. Br. 17, cannot matter when the trial court *sua sponte* found Mr. Owens guilty based on facts not in evidence. In sum, it cannot be disputed that there is clearly established federal law that entitled Mr. Owens to be tried and convicted based only on the evidence introduced at trial.

B. Nearly Identical Facts Are Not Necessary To Show Clearly Established Federal Law.

Given the undisputed "constitutional right to be judged solely on the basis of proof adduced at trial," *Taylor*, 436 U.S. at 486, and the indisputable fact that the trial court based its guilty verdict on facts with no evidentiary basis, App. 119a, Petitioner argues that habeas relief must be denied because none of the foregoing cases specifically apply this fundamental right to a trial court's unsupported fact-findings. Pet. Br. 15-20. But showing clearly established federal law does not require showing

that this Court has previously addressed a case with nearly identical facts. Petitioner cites *Marshall v. Rodgers*, 133 S. Ct. 1446, 1449 (2013) (per curiam) for this proposition. *See* Pet. Br. 14-15. But *Marshall* is inapposite. In *Marshall*, the Court denied habeas relief not because the facts differed from earlier cases, but because the supposed underlying right was not clearly established. The defendant in *Marshall* repeatedly changed his mind about whether to proceed *pro se* at trial; the third time he changed his mind and requested appointed counsel, his request was denied. *Id.* at 1448. The Court denied habeas relief because it had never clearly established the right of a criminal defendant to "re-assert his right to counsel once he has validly waived it." *Id.* at 1449 (quotation omitted). Significantly, however, the Court went on to explain "that the lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since a 'general standard' from this Court's cases can supply such law." *Id.* (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)); *see also Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in judgment in part and dissenting in part) ("AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.").

To hold otherwise would transform habeas corpus analysis from what should be a legal inquiry as to the existence of clearly established federal law into a search for cases with surface-level factual

similarities. Petitioner's rationale would leave federal courts powerless to grant habeas relief in cases where a violation of a constitutional "general standard from this Court's cases," *Marshall*, 133 S. Ct. at 1449 (quotation omitted), is flagrant, but a case with nearly identical facts has not yet reached this Court.

For this very reason, Section 2254(d)(1) does not require that this Court have previously addressed specifically the content of findings made by a trial court in pronouncing a verdict in a criminal bench trial for this Court to determine that Mr. Owens's conviction violates the clearly established constitutional rule that criminal defendants should be convicted *only* on the basis of evidence introduced at trial. This rule is clear and specific. Consequently, "the range of reasonable judgment" under this rule is "narrow. Applications of the rule may be plainly correct or incorrect." *Yarborough*, 541 U.S. at 663-64. It would be difficult to conjure a clearer, more unreasonable violation of this rule than a trial court explaining that its reason for finding a defendant guilty rests on facts supported nowhere in the trial record.

Indeed, this Court applies general rules of a fundamental nature to grant habeas relief when "faced, as we are here, with a record that cannot, under any reasonable interpretation of the controlling legal standard, support a certain legal ruling." *Panetti*, 551 U.S. at 953; *accord Musladin*, 549 U.S. at 80-81 (Kennedy, J., concurring in judgment in part and dissenting in part).

For example, *Lafler*, 132 S. Ct. 1376, demonstrates that this Court does not require nearly identical facts for a principle of law to be clearly established under § 2254(d). Before *Lafler*, this Court had held that the standard for ineffective assistance of counsel of *Strickland v. Washington*, 466 U.S. 668 (1984), applied to a defendant's claim that, but for defense counsel's erroneous advice regarding parole eligibility, defendant would have rejected a plea offer. *Hill v. Lockhart*, 474 U.S. 52, 58-60 (1985). But as this Court explicitly acknowledged, in *Lafler* the facts were reversed: The defendant claimed that but for the alleged ineffective assistance of counsel, defendant would have *accepted* a plea offer. "In contrast to *Hill*, here the ineffective advice led not to an offer's acceptance but to its rejection." *Lafler*, 132 S. Ct. at 1385. Unlike *Hill*, the *Lafler* defendant was sentenced after conviction at "a full and fair trial before a jury." *Id.* at 1383. "Having to stand trial, not choosing to waive it, is the prejudice alleged." *Id.* at 1385. The Court held that these factual differences between *Lafler* and prior precedent did not preclude the *Lafler* defendant from satisfying AEDPA § 2254(d)(1): "By failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law." *Id.* at 1390.

Similarly, *Panetti* held that the broad Eighth Amendment prohibition against executing a prisoner who is insane announced in *Ford v. Wainwright*, 477 U.S. 399 (1986), was clearly established federal law

under Section 2254(d)(1). *Panetti*, 551 U.S. at 948. Neither the fact that *Ford* did not establish specific due process requirements concerning the processes for establishing insanity nor the fact that the Texas procedures in *Panetti* varied widely from the Florida procedures in *Ford*, giving the two cases very different factual backgrounds, prohibited the federal courts from concluding that Texas had applied *Ford* unreasonably. *Id.* at 953-54.

The due process rule Mr. Owens invokes here is specific and this Court has applied it in different procedural settings over the years, as Section I.A. above demonstrates. There can be no doubt clearly established federal law prohibits trial courts from finding defendants guilty based on unsupported facts. Therefore, Petitioner is incorrect to insist that the absence of a case with nearly identical facts bars Mr. Owens from relief under § 2254(d).

Petitioner unsuccessfully attempts to portray the court of appeals decision as "fail[ing] to heed this Court's repeated warning that the lower courts should not 'frame[] the issue at too high a level of generality' in discussing whether a principle is clearly established enough to support habeas relief." Pet. Br. 18 (quoting *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (per curiam)). As with *Marshall*, Petitioner's other per curiam decisions generally involve facts that simply do not qualify as constitutional violations; not a single case denies habeas relief with a fact scenario that squarely violates a constitutional right. Thus, Petitioner's cases are not relevant to this case, where the trial

court convicted Mr. Owens based upon supposed facts entirely absent from the record of his trial in violation of the clearly established fundamental due process right to be judged solely on the basis of evidence in the record.

For example, in *Woods*, 135 S. Ct. at 1375-78, the Court merely held that petitioner's counsel's ten-minute absence from the courtroom while the trial focused exclusively on evidence that related only to co-defendants and not to petitioner did not support a habeas claim of denial of counsel at a "critical stage of his trial," 135 S. Ct. at 1375 (quotation omitted), or a presumption of constitutional prejudice under *United States v. Cronic*, 466 U.S. 648 (1984).

In *Nevada v. Jackson*, 133 S. Ct. 1990, 1993 (2013) (per curiam), the Court held that *Michigan v. Lucas*, 500 U.S. 145 (1991) did not clearly establish a constitutional right to habeas relief for a rape defendant who failed to comply with a state statute requiring prior notice of intent to cross-examine a complaining witness about supposedly fabricated previous sexual assault accusations, particularly where "the proffered evidence had little impeachment value because at most it showed simply that the victim's reports could not be corroborated." 133 S. Ct. at 1993.

Similarly, in *Lopez v. Smith*, 135 S. Ct. 1, 2-4 (2014) (per curiam) the defendant, who was charged with murder and whose DNA was found on the murder weapon and on duct tape and a burned matchstick that may have been used in the murder, complained that the prosecution had not provided

adequate advance notice that it would seek an aiding–and–abetting jury instruction along with instructions on other theories of liability for the charged murder. Because no cases of this Court had even come close to requiring notice of alternate theories of liability for a charged offense, the defendant in *Lopez* cited only to general cases concerning the right of defendants to know the charges against them and the Ninth Circuit issued habeas relief because "it found the instant case to be 'indistinguishable from' the Ninth Circuit's own decision" in a prior case. *Id.* at 3 (quotation omitted).

Petitioner's reliance on *Musladin*, Pet. Br. 18-20, is also misplaced: In *Musladin*, this Court addressed the question of whether the holdings of *Estelle* and *Holbrook v. Flynn* clearly established federal law concerning the conduct of spectators at a trial. The Court held there was no "clearly established Federal law" that required applying the relevant tests to spectators' conduct rather than to the conduct of the state at trial: "In contrast to state-sponsored courtroom practices [as in *Estelle* and *Flynn*], the effect on a defendant's fair-trial rights of the spectator conduct to which Musladin objects is an open question in our jurisprudence." 549 U.S. at 76-77 The distinction between state conduct and private-actor courtroom conduct has no relevance here. The trial court's conduct in deciding Mr. Owens's trial was unquestionably state conduct. As to *state* conduct, the *Musladin* Court did not question that *Estelle* and *Flynn* provide clearly established law. *Id.* at 75-77 *Musladin* never

mentions *Taylor v. Kentucky* or its clear establishment of "the accused's constitutional right to be judged solely on the basis of proof adduced at trial." *Compare Taylor*, 436 U.S. at 484-90 *with Musladin*, 549 U.S. at 75-77

This Court's precedents establish conclusively that there is clearly established federal law that a criminal defendant has a constitutional right to be judged solely on the basis of proof adduced at trial. In Mr. Owens's case, the trial court violated that right by explicitly basing its guilty verdict on fact-findings of knowledge and motive that absolutely no evidence at trial supported. Consequently, the grant of habeas relief to Mr. Owens should be affirmed.[9]

C. Petitioner Cannot Deny The Constitutional Violation By Arguing That Motive Is Not An Element Of The Offense.

Petitioner's effort to minimize the significance of the trial court's wholly unsupported findings by characterizing them as pertaining only to motive and therefore as "not an element of the crime" rings hollow. Pet. Br. 22. Although motive is not a separate element of the offense of murder in Illinois, it is a means of proving *who* committed the murder,

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[9] Petitioner's *amici* contend that any inquiry into the reasoning of the fact-finder is precluded, but *amici* cite cases that relate specifically to inconsistent verdicts. *Amici* Br. 11-12 (citing *United States v. Powell*, 469 U.S. 57, 65 (1984) and *Harris v. Rivera*, 454 U.S. at 348). Nothing in either case requires courts to ignore the constitutional violation of clearly established federal law in this case.

which most certainly is an element the state had to prove to convict Mr. Owens here – indeed *the* element at issue in the trial. The state said so at closing: "Judge, it boils down to identification." JA110. But, the eyewitness identification testimony of Mr. Johnnie and Mr. Evans only persuaded the trial court that they had "skirted the real issue." JA133. Rather than crediting their identification testimony, the trial court specified that the "real issue" was Mr. Owens's supposed motive: "The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who Larry Owens knew he was a drug dealer. Larry Owens wanted to knock him off." JA133.

This Court has addressed the importance of motive evidence before in cases of identification. In *House v. Bell*, 547 U.S. 518 (2006), the Court addressed a request for habeas relief from a state murder conviction where the state adduced DNA evidence at trial suggesting that the defendant had had sexual contact with the victim shortly before the murder. At the habeas proceedings that DNA evidence proved false and the state, as it did here, argued that neither the sexual conduct nor the motive established at trial through the bad DNA evidence were elements of the offense. *Id.* at 540. This Court disagreed: "From beginning to end the case is about who committed the crime. *When identity is in question, motive is key.*" *Id.* (emphasis added). The Court reversed the lower court's refusal to hear procedurally defaulted claims and remanded to allow the defendant to pursue the "actual

innocence" exception to procedural default. *Id.* at 553-55.

Petitioner relies on Illinois law for his argument about motive. Pet. Br. 15-16. But the Illinois Supreme Court has agreed with this Court about the significance of motive. In *People v. Smith*, 565 N.E.2d 900 (Ill. 1990), the state had obtained a conviction using gang involvement as a motive. Acknowledging "that motive is not an essential element of the crime of murder," the Illinois Supreme Court stated: "It is also well established, however, that any evidence which tends to show that an accused had a motive for killing the deceased is relevant because it renders more probable that the accused did kill the deceased." *Id.* at 906 (citing cases). Therefore, "when the State undertakes to prove facts which the State asserts constitute a motive for the crime charged, *it must be shown that the accused knew of those facts.*" *Id.* (emphasis added) (citing cases). Yet Mr. Owens's supposed knowledge that Mr. Nelson was a drug dealer and wanted to kill him because he was a drug dealer was a key fact the trial court simply made up. App. 119a. Far from supporting Petitioner's position, the Illinois Supreme Court reversed the conviction in *Smith*. 565 N.E.2d at 917.

Petitioner argues that the trial court's statement that "I think the State's evidence has proved that fact," JA133, somehow immunizes the verdict here. Pet. Br. 22. This argument has no basis in law, logic, or fact. A fact-finder cannot create a safe harbor for erroneous reliance on facts not in evidence by simply

stating, contrary to the record, that such facts *were* in evidence. The state's evidence did *not* prove that Mr. Owens "knew" Mr. Nelson was a drug dealer, or knew him at all. The state's evidence did *not* prove that Mr. Owens "wanted to knock him off." The circularity of Petitioner's argument -- that the trial court's verdict was based on record evidence if the fact-finder says it was -- is contrary to the fundamental constitutional guarantee that one cannot be deprived of life or liberty based on speculation or conjecture. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993); *Taylor*, 436 U.S. at 484-86.

As *House* and *Smith* establish, motive relates directly to the element of proving who committed the crime. Under the clearly established caselaw of this Court, Mr. Owens had a due process right to have his supposed motive, and thus his guilt, "judged solely on the basis of proof adduced at trial." *Taylor*, 436 U.S. at 486. Because that did not happen here – because the trial court found that Mr. Owens had the knowledge required to prove motive without any evidence to support that finding – the issuance of the writ should be affirmed.

II. The Violation Of Mr. Owens's Due Process Right Was Not Harmless Error.

The trial court's violation of clearly established federal law was not harmless error. The error clearly inflicted actual prejudice on Mr. Owens; it had a "'substantial and injurious effect or influence in determining'" his guilty verdict. *Brecht*, 507 U.S. at 637-38 (quoting *Kotteakos v. United States*, 328

U.S. 750, 776 (1946)); *see also Ayala*, 135 S. Ct. 2187; *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007).

Nor can the state appellate court's two-to-one ruling that the trial court's error was harmless whitewash the actual prejudice Mr. Owens suffered from the violation of his clearly established rights. The appellate court's harmless error ruling was unreasonable for two reasons. First, it is contrary to this Court's clearly established precedents governing determining whether error is harmless in habeas review because the state appellate court engaged in the simple subtraction analysis deemed improper in *Brecht* and *Kotteakos*.

Second, the state appellate court's unreasonable approach to harmless error review had the effect of improperly supplanting the trial court as arbiter of witness credibility and primary fact-finder. Petitioner concedes as much by arguing that "[t]he Seventh Circuit ... wrongly rejected the Illinois Appellate Court's reasonable *findings of fact*." Pet. Br. 21 (emphasis added). The state appellate court had no business making findings of fact and its findings are unreasonably based upon speculation, in violation of *Sullivan*, 508 U.S. at 281, and are actually prejudicial to Mr. Owens.

A "harmlessness determination itself must be 'unreasonable' for habeas relief to issue, and the determination 'is not unreasonable if 'fairminded jurists could disagree' on its correctness." *Ayala*, 135 S. Ct. at 2199 (*quoting Harrington v. Richter*, 562 U.S. 86, 101 (2011)); *see also* Pet. Br. 24; *Amici* Br. 17-19. This standard is very deferential, but it is

surmountable here. Recently, the Court set forth the analogous standard for Section 2254(d)(2) in *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015) ("If [r]easonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's ... determination") (quotation omitted). Nevertheless, the Court stated: "As we have also observed, however, [e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review, and does not by definition preclude relief." *Id.* (quotation and citations omitted). The appellate court's harmlessness determination here violates clearly established precedent from this Court and is unreasonable. Relief is warranted here.

A. The State Appellate Court's Ruling Of Harmless Error Violated This Court's Clearly Established Law And Resulted In Actual Prejudice.

A review of the state appellate court's order reveals why its harmless error analysis is unreasonable and fails the *Brecht* test. In a two-to-one decision, that court held that the trial court's error was harmless because "defendant's conviction rests upon the eyewitness testimony of Johnnie and Evans, each of whom separately identified defendant as Nelson's assailant." App. 119a. But the appellate court conceded: "It is true that Johnnie and Evans contradict each other on some points regarding the event, and the reliability of Evans' testimony is severely called into question." App. 119a (footnotes

omitted). Ultimately, the appellate court deemed the error harmless because "Johnnie's identification testimony is reliable and sufficient enough to support the trial court's guilty verdict." App. 119a-120a. Petitioner likewise relies on Mr. Johnnie's testimony to support the argument that the constitutional error was harmless. Pet. Br. 25-26.

Petitioner misunderstands the Court's precedents clearly establishing the legal standard for determining whether a constitutional error was harmless under Section 2254. The Court has repeatedly applied the "substantial and injurious" standard adopted in *Brecht*, 507 U.S. at 637-38, from *Kotteakos*, 328 U.S. at 776 when conducting habeas review of state criminal convictions.

Contrary to the state appellate court's approach and Petitioner's argument, this Court's clearly established precedents demonstrate that the "substantial and injurious" standard is not merely a subtraction exercise. "This [review of error] must take account of what the error meant to [the fact-finder], not singled out and standing alone, but in relation to all else that happened." *Kotteakos*, 328 U.S. at 764. The Court explained, "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* at 765. As the Court stated in *O'Neal v. McAninch*, 513 U.S. 432 (1995), *Brecht* held "that the *Kotteakos*

standard applied in its *entirety*." *Id.* at 439 (Court's emphasis).[10]

The state appellate court, however, conducted "[t]he inquiry [that] cannot be" under *Kotteakos*, 328 U.S. at 765: It merely set aside the trial court's acknowledged error and looked to the remainder of the record for its harmlessness determination. As the appellate court acknowledged, there is no dispute that the trial court explicitly considered facts that were not part of the record in rendering its verdict. App. 119a. The trial court expressly stated that it convicted Mr. Owens based on Mr. Owens's supposed knowledge that Mr. Nelson was a drug dealer and Mr. Owens's supposed desire to "knock him off" because he dealt drugs. JA133. As the appellate court acknowledged, those facts were not in evidence: "there was no evidence presented that defendant knew Nelson was dealing drugs, and there was no evidence presented that defendant was involved with gangs or the illegal drug trade." App. 119a.

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[10] *O'Neal* also clarified "the legal rule that governs the special circumstance in which record review leaves the conscientious judge in grave doubt about the likely effect of an error on the jury's verdict." *Id.* at 435. Explaining that "grave doubt" means "that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error," the Court concluded "that the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (*i.e.*, as if it had a 'substantial and injurious effect or influence in determining the jury's verdict')." *Id.* That principle need not be invoked here because there should be no doubt that the error here had a substantial and injurious effect on the guilty verdict.

To get around the trial court's actual stated reason for finding Mr. Owens guilty, the appellate court simply looked to other evidence to shore up the undermined conviction: "Johnnie's identification testimony is reliable and sufficient enough to support the trial court's guilty verdict." App. 119a-120a. It also stated that "despite the contradictions between their testimony," Mr. Evans, whose reliability, the court admitted, "is severely called into question," corroborated Johnnie. App. 119a-120a. "Therefore," the appellate court concluded, "in light of these identifications, the trial court's speculation as to defendant's motive for assaulting Nelson, will be construed as harmless error." App. 120a.

The trial court never said it believed either witness. The state appellate court admitted that fact: "Here, there is no indication whether or not the trial court assessed the credibility of the eyewitnesses, resolved conflicts in their testimony, or weighed the evidence or drew reasonable inferences therefrom." App. 118a. In fact, the trial court expressly found the witnesses' testimony insufficient, stating that "all of the witnesses skirted the real issue." JA133. As the dissent concluded, "the record affirmatively demonstrates that the court reached its verdict *solely* based upon defendant's purported motive." App. 128a (emphasis added).

The state appellate court's analysis thus is one of pure subtraction, dropping what the trial court said it found *without analyzing what the trial court would have ruled absent the motive the trial court found outcome-determinative.* This was an erroneous and

unreasonable means to determine harmless error. The state appellate court did *not*, as this Court's clearly established caselaw requires, assess "what effect [this error] had upon the guilty verdict in the case at hand," *Sullivan*, 508 U.S. at 279 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967); it did *not* "declare a belief that [the error] was harmless beyond a reasonable doubt," *Chapman,* 386 U.S. at 24; and it did *not* address "the impact of the thing done wrong on the mind[] of [the trial court], not on [the appellate court's] own, in the total setting," *Kotteakos*, 328 U.S. at 764.

The *only* manner in which the appellate court addressed the trial court's clear rejection of the eyewitnesses' testimony here was to try to erase that rejection by invoking a presumption that "despite the trial judge's comments ... the trial judge considered only competent evidence in reaching his verdict." App. 118a. As noted above, however, the appellate court got that backwards: The trial court's comments rebutted the presumption. As the dissent stated: "In the instant case that presumption has been clearly and undeniably rebutted." App. 128a.

Thus, the state appellate court's harmless error analysis violated the applicable clearly established federal legal standard for determining harmless error set forth in this Court's decisions. It was both unreasonable and actually prejudicial.

B. The State Appellate Court's Ruling Of Harmless Error Was Also Unreasonable Because It Depended On That Court's Assessment Of The Credibility Of Witnesses It Never Saw, Whom The Trial Court Did Not Credit.

Furthermore, the state appellate court's assessment of the evidence that the state actually introduced is unreasonable because that assessment hinges completely on assessing the credibility of eyewitnesses that court never saw.[11] Significantly, the state appellate court here was *not* in a position to uphold a decision by the trial court to believe these key witnesses or credit their identifications. The trial court found "all of the witnesses" had "skirted the real issue." JA133. Rather than crediting their identification testimony, the trial court invented motive evidence to tie Mr. Owens to the attack on Mr. Nelson. JA133. This is not a ringing endorsement of the witnesses' credibility by the trial court which actually observed their demeanor and heard their testimony firsthand.

If the trial court had believed the eyewitness identification testimony, it would not have had to turn to motive to find guilt. But the trial court did

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[11] The state appellate court recognized that "of all the factors that account for the conviction of the innocent, the fallibility of eyewitness identification ranks at the top, far above all the others." App. 117a (quotation omitted). The state appellate court thus shared with the Seventh Circuit "the substantial doubts that have been raised concerning the reliability of eyewitness evidence." App. 4a (listing scholarly studies).

not say anything resembling 'I believe Mr. Johnnie.' The trial court said Mr. Johnnie and the other witnesses "skirted the real issue" and then ruled:

> The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who Larry Owens knew he was a drug dealer. Larry Owens wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder.

JA133. By finding as facts Mr. Owens's supposed knowledge and motive, which the state never even tried to prove, and convicting based on those unsupported facts, the trial court relieved the state of its burden of proving beyond a reasonable doubt that Mr. Owens killed Mr. Nelson, much like the erroneous "reasonable doubt" instruction in *Sullivan*. In this case, as in *Sullivan*, that meant that a state appellate court became the first court to apply the reasonable doubt standard to the actual evidence in the record, a role it is not equipped to handle: "A reviewing court can only engage in pure speculation – its view of what a reasonable [fact-finder] would have done. And when it does that, the wrong entity judges the defendant guilty." *Sullivan*, 508 U.S. at 281 (quotation and citation omitted).

In performing its analysis, the state appellate court relied on *Neil v. Biggers*, 409 U.S. 188 (1972), App. 117a, 120a, but that decision's test was not designed to allow an appellate court to evaluate the credibility of witnesses itself in the first instance and it was not designed as a substitute for harmless error analysis. *Biggers* addresses the admissibility of

evidence of a suggestive confrontation procedure, but does not authorize an appellate court to credit a witness's identification where the trial court who observed the witness's testimony did not. 409 U.S. at 198-201.[12] Moreover, as the analysis below reveals, the appellate court ignored many problems with Mr. Johnnie's testimony, invalidating this analysis.[13]

Significantly, the appellate court admonished the trial court "that in a case such as this, where there is no physical evidence linking defendant to the crime and the identity of the perpetrator of the charged

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[12] Furthermore, Mr. Johnnie's identification does not compare favorably with the identification made by the rape victim in *Biggers*. She "spent a considerable period of time with her assailant, up to half an hour." 409 U.S. at 200. Mr. Johnnie saw Mr. Nelson's assailant "under very stressful circumstances within a brief time span." App. 128a (South, J. dissenting). The description given by the victim in *Biggers* "included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice...." 409 U.S. at 200-01. Mr. Johnnie's description included only approximate height and weight. JA37.

[13] The state attempts to support the appellate court's harmless error analysis with Officer Alexander's testimony that Mr. Owens sought to elude him. Pet. Br. 27. The appellate court did not mention that testimony in its harmless error analysis, App. 118a-122a, just as the trial court never mentioned it, JA133, and with good reason. Fleeing a traffic stop could be the result of countless causes short of murder. Indeed one concerned about being arrested for murder is not likely to travel fifty miles per hour in a twenty mile per hour zone in the area near the attack. *See* App. 100a. A month after the attack on Mr. Nelson, this fact cannot possibly make the trial judge's unsupported guilty verdict harmless error.

crime is at issue and defendant's conviction rests upon eyewitness testimony – every effort should be made to assess the credibility of the eyewitnesses, resolve any conflicts in their testimony, weigh the evidence and draw reasonable inferences therefrom." App. 120a. But the appellate court did not remand to the trial court for that purpose. Instead, it tried to do all those things itself with respect to witnesses it had never seen. That contradicts this Court's admonishment about such an effort in *Sullivan*: "A reviewing court can only engage in pure speculation.... And when it does that, the wrong entity judges the defendant guilty." 508 U.S. at 281 (quotation and citation omitted).

Certainly, the trial court had many good reasons in the trial record *not* to credit these eyewitnesses, only a few of which the appellate court acknowledged, and none of which that court weighed fully. The appellate court noted "that Johnnie and Evans contradict each other on some points regarding the event...." App. 119a. Specifically, the appellate court said:

> Evans testified that two men approached Nelson, one of whom beat Nelson with a bat and afterwards both men ran away from the scene. Johnnie testified, however, that Nelson was approached by only one individual who beat him, and afterwards this individual walked away from the scene.

App. 119a n.2. But the conflicts between Mr. Evans and Mr. Johnnie were greater than the appellate court portrayed them: Mr. Evans claimed that he

saw Mr. Nelson have a conversation with his two assailants before the attack, JA79; but Mr. Johnnie saw no conversation, saying that the lone assailant strode up and hit Mr. Nelson immediately with the bat, JA22-24. Furthermore, cross-examination revealed that Mr. Evans testified before the grand jury that the two assailants encountered Mr. Nelson after they exited from Mackie's, JA102, another conflict with Mr. Johnnie's testimony.

The appellate court also noted that "the reliability of Evans' testimony is severely called into question." App. 119a. It explained:

> Evans' testimony was weakened by the fact that at trial he twice misidentified defendant's photograph in the photo-array, even though he testified that he recognized defendant from the neighborhood. Moreover, Evans' testimony was further weakened by the fact that during the trial he was in custody, and in exchange for his trial testimony the State agreed to recommend a sentence of probation on a pending drug charge and to recommend a recommitment of probation on an old drug charge.

App. 119a n.3. Again, the appellate court understated the problems with Mr. Evans's credibility. With respect to Mr. Evans's two drug charges, although the appellate court did not specify, they were not simple possession charges. One was for "possession of a controlled substance with intent to deliver" and the other for actual "delivery of [a] controlled substance," JA75.

With respect to the trial testimony about the photo-array, it is not clear that Mr. Evans "misidentified defendant's photograph in the photo-array," as the appellate court suggests. App. 119a. n.3. The state asked Mr. Evans which photo he selected at the array and he *twice identified the photograph of a different person.* JA86. It is thus also possible that Mr. Evans identified a different person at the photo-array, which would have contradicted Sergeant White's testimony, JA68-69 (this is how Mr. Owens's attorney understood this testimony, JA118).[14]

Additionally, the trial record shows that the trial court had good reason to doubt the accuracy of Mr. Johnnie's testimony, quite apart from the conflicting testimony from Mr. Evans. First, there is no dispute that Mr. Johnnie's testimony on the vital topic of his initial photo identification also contradicted the testimony of Sergeant White. Mr. Johnnie testified he had reviewed a whole *book* of photographs to identify Mr. Owens. JA44. In contrast, Sergeant White testified that Mr. Johnnie viewed a photo-array of six pictures. JA59. Furthermore, Mr. Owens was the only person in both the photo-array and the line-up for both witnesses, and Mr. Johnnie

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[14] Lack of certainty in the photo-array identification could explain why the state never obtained a warrant for Mr. Owens's arrest. *See* App. 100a.

admitted remembering at the line-up that the only person in both was Mr. Owens. JA45.[15]

As far as his ability to observe is concerned, Mr. Johnnie admitted he did not see the bat in the assailant's hands as the assailant approached Mr. Nelson: "At that time I did not see anything in his hands." JA23. Mr. Johnnie was paying the assailant little heed until the attack occurred. During the attack, the assailant's back was to the car and to Mr. Johnnie – Mr. Johnnie acknowledged that fact by saying he had the best chance to see the assailant as he turned to leave. JA52. Mr. Johnnie said the assailant "walked away," JA52, but Mr. Evans testified, "they took off running," JA84. Moreover, although Mr. Johnnie testified that his car was parked right in front of the door at Mackie's, JA17-18, Mr. Evans testified that he never saw Mr. Johnnie's car until they were putting Mr. Nelson into it after the attack, JA94; *see* also, JA79. The state impeached Mr. Evans with his grand jury testimony that Mr. Nelson left him and "went to talk to some guys in the car." JA103.

Additionally, Mr. Johnnie's actions after the attack, as established in the record, *i.e.*, refusing to enter the hospital, avoiding the police back at

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[15] Recognizing that allowing the investigating officer to conduct identification procedures is fraught with risk, Illinois has since enacted a law to enhance identification reliability that calls for, *inter alia*, an independent lineup administrator "who is not participating in the investigation of the criminal offense and is unaware of which person in the lineup is the suspected perpetrator." *See* 725 ILCS 5/107A-0.1, 5/107A-2 (2015).

Mackie's, not contacting the police at all until they tracked him down, JA36-37, 49-51, 53-54, coupled with his efforts at trial to testify falsely that he participated in Mr. Morgan's conversations with the police, exposed on cross-examination, JA36-37, 54, may have caused the trial court to question Mr. Johnnie's credibility. Even unusual facts, like the fact that Mr. Johnnie was not driving his own car and the fact that Mr. Johnnie did not know the third person in his car, JA17, might have weighed into the trial court's credibility assessment.

The trial record thus contains much evidence from which the trial court could have decided not to believe the witnesses. JA133. Assessing isolated pieces of evidence (under *Biggers,* instead of determining whether the error was harmless beyond a reasonable doubt under *Chapman*), the state appellate court unreasonably engaged in pure speculation concerning the credibility of eyewitnesses it did not observe, and whose identification evidence the trial court eschewed in favor of a motive-based finding of guilt. For this reason too, the appellate court's harmlessness test is unreasonable and fails the *Brecht* test: It fails to show that the trial court's invented motive evidence did not have a "substantial and injurious effect or influence" on Mr. Owens's guilty verdict. *Brecht*, 507 U.S. at 623 (quotation and citation omitted).

C. Petitioner's Citation To Section 2254(e)(1) Cannot Save The State Appellate Court's Ruling.

Petitioner did not raise 28 U.S.C. § 2254 (e)(1) in his petition for certiorari or in the court of appeals. This Court deems issues not raised in a petition for certiorari waived. Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); Sup. Ct. R. 24.1(a) ("[T]he brief may not raise additional questions or change the substance of the questions already presented in [the petition for certiorari or jurisdictional statement]."); *see also Taylor v. Freeland & Kronz*, 503 U.S. 638, 645 (1992). Moreover, "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). "These principles help to maintain the integrity of the process of certiorari." *Freeland & Kronz*, 503 U.S. at 646. Therefore this Court should not address Section 2254(e)(1).

Even if not waived, Petitioner's argument that Section 2254(e)(1)'s presumption of correctness applies to the state appellate court's harmlessness determination, Pet. Br. 26, lacks merit. It conflates distinct AEDPA standards of review that apply in distinct contexts. A state appellate court's conclusion that constitutional error was harmless is a conclusion of law reviewed under the requirements of Section 2254(d)(1) and *Brecht*. *See Ayala*, 135 S. Ct. at 2198-99 (explaining that Section 2254(d)(1)

applies to state court harmless error determinations). "The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions." *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003).

Petitioner argues that the appellate court's legal conclusion of harmless error is entitled to a presumption of correctness under Section 2254(e)(1) because the court "analyzed" and "noted" facts in the trial record in its legal analysis. Pet. Br. 25. This understanding of Section 2254(e)(1) is incorrect. Section 2254(d)(1) applies to legal conclusions, Section 2254(d)(2) applies to overall factual "decision[s]," and Section 2254(e)(1) supplies a burden of proof for rebutting a state court's "determination of a factual issue." 28 U.S.C. § 2254(d), (e). Section 2254(e)(1)'s presumption of correctness is relevant to federal postconviction review of predicate factual "determination[s]" of a state court, not to the state court's legal conclusions or its ultimate factual "decision." While this Court has declined to specify the exact parameters of § 2254(e)(1) in relation to § 2254(d), this Court has explained that Sections 2254(d) and (e) operate independently and should not be conflated: "AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence." *Cockrell*, 537 U.S. at 341. Petitioner cites no cases for its argument that Section 2254(e)(1) should apply here, and Section 2254(e)(1) is

inapposite and irrelevant to this Court's review of the appellate court's harmless error analysis.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the court of appeals to issue the writ of habeas corpus. Alternatively, this Court should remand for reconsideration of the *Brecht* harmless error analysis in light of this Court's intervening decision in *Davis v. Ayala*, 135 S. Ct. 2187 (2015).

Respectfully submitted,

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